IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NOS. 14 AND 17 OF 2001.

CRIMINAL APPEAL NO. 14 OF 2001.

Madhu Balchandra Nair,
presently lodged at Central
Jail, Aguada, Sinquerim, Goa. ... Appellant.

Versus

State of Goa, represented
by Officer-in-charge, A.N.
C. Police Station, Panaji. ... Respondent.

CRIMINAL APPEAL NO. 17 OF 2001.

Anis Khan, presently
lodged at Central Jail,
Aguada, sinquerim, Goa. ... Appellant.

Versus

State of Goa, through P.P.,
Panaji. ... Respondent.

Mr. J.P. D'Souza with Ms. C. Colasso, Advocates for the Appellant in both Appeals.

Mr. A.P. Lawande, Public Prosecutor for the Respondent in both Appeals.

Coram: P.V. HARDAS, J.

Date: 2nd August 2002.

The appellant in Criminal Appeal No. 14 of 2001 is the original accused No. 1 and appellant in Criminal Appeal No. 17 of 2001 is the original accused No. 2. Both the appellants have filed these Appeals challenging their conviction under Section 20(b)(ii) and Section 29 of the N.D.P.S. Act and sentence of 10 years rigorous imprisonment and payment of fine of Rs. 1 lakh and in default to undergo simple imprisonment for one year, passed by the Special Judge, N.D.P.S.

Court, Mapusa, by a Judgment dated 21st December 2000 in Special Criminal Case No. 19 of 1998. Both the Appeals are, therefore, decided by this common Judgment.

2. The facts necessary for the decision of the Appeals are set out hereunder:-

P.W.4 P.I. Lavu Mamledar was attached to the Anti-Narcotic Cell, Panaji Police Station, in the year 1998 as an Officer-in-Charge. On 19th June 1998, at about 10.00 a.m., he received a specific and reliable information that three persons, namely, Madhu Nair, Anis Khan and one Saji from Kerala would be coming in front of 'Our Lady of Perpetual High School, Cortalim' to deliver the consignment of charas weighing about 5 kgs. and also that they would be coming on a scooter bearing No. GA02-F-6296 between 7.00 p.m. to 10.00 p.m.. P.W.4 P.I. Mamledar reduced the said information into writing and gave a copy thereof to the Superintendent of Police Satish Golcha (P.W.5). The said information as reduced into writing and sent to P.W.5 Golcha is at Exhibit P.W.4/B Colly. P.W.4 P.I. Mamledar then sent a letter to the Directorate of Transport for sending two persons to act as panchas. Accordingly at 11.00 a.m. two panchas, namely, P.W.3 Sunil Meraji and one Domingos Araujo came to the police

station. P.W.4 P.I. Mamledar then explained to the panchas and the raiding party about the information which he had received and which had been conveyed to the Superintendent of Police, C.I.D.. Thereafter at about 8.00 p.m. the raiding party consisting of P.I. Mamledar, the panchas and the other police officers left for Cortalim in four different vehicles.

3. At about 8.30 p.m. they reached near 'Our Lady of Perpetual High School', hereinafter referred to as 'the school' for the sake of brevity, and noticed a scooter bearing registration No. GA02-F-6296 parked in front of the school. They also noticed that two persons were sitting on the parked scooter and one person, who had a jute bag, was standing near the scooter. P.W.4 P.I. Mamledar informed the members that the persons sitting on the scooter and one standing near the scooter were the same persons in respect of whom he had received the information. The raiding party then alighted from the vehicles and surrounded the persons. One person, who was sitting on the scooter, managed to evade the cordon of police officers and escaped despite the chase given by one constable. P.W.4 P.I. Mamledar then asked both the persons about their names and the said persons disclosed their names as Madhu Balchandra Nair and Anis Khan. The said persons are the present appellants and

original accused 1 and 2 respectively in the trial. P.W.4 P.I. Mamledar then disclosed his identity to the two persons accosted by the raiding party and introduced the members of the raiding party, including the panchas. He then informed the persons who were accosted about the information which he had received and told them that he wanted to search them for drugs. P.W.4 P.I. Mamledar then gave the said two persons an offer of being searched in the presence of a Gazetted Officer or a Magistrate and also told the said persons that they had a right to search the members of the raiding party including the panchas. According to P.W.4 P.I. Mamledar, the offers were given separately to each accused. Both the accused declined the offers and agreed to be searched in the presence of Golcha, the panchas and the members of the raiding party.

4. P.W.4 P.I. Mamledar then took the search of the appellant/original accused no. 1 Madhu. During the search in the right hand side pant pocket, P.W.4 P.I. Mamledar found polythene packet containing brownish colour cylindrical substance and on sniffing the said substance P.W.4 informed the panchas that he suspected the substance to be charas. On counting the cylindrical substances it was found that they were nine in number. The said cylindrical substances alongwith the polythene bag weighed 60 gms. It was packed,

sealed and signatures of the panchas and the accused were obtained. P.W.4 P.I. Mamledar also signed on the said packet. The said packet was marked as 'Sample No. 1'. P.W.4 P.I. Mamledar then took the search of appellant/original accused no. 2 Anis Khan, but, did not find anything incriminating on his person. P.W.4 P.I. Mamledar then asked Anis Khan to hand over the bag, which was on his shoulder. Anis Khan handed over the bag to P.W.4 P.I. Mamledar. On opening the bag P.W.4 P.I. Mamledar noticed one white colour polythene bag inside and on opening the polythene bag, he found five bundles wrapped in a Hindi newspaper. Out of the five bundles, one was partly open and contained brownish cylindrical substance. After sniffing at the substance, P.W.4 P.I. Mamledar informed the panchas that he suspected the substance to be charas. The cylindrical substance was wrapped in a transparent polythene bag and taped with plastic tape. The partly opened bundle was weighed and it was found to weigh 685 gms.. The other bundles were opened by removing the newspaper, tape and the transparent bag. Individually each bundle was weighing 1 kg.. The entire contraband was put in an envelope, packed, sealed and signed by the accused, panchas and the raiding members and was marked as 'Sample No. 2'. The scooter found at the school was also attached. On being asked to produce documents of possession of the narcotic, both the

accused were unable to produce any documents and were informed by P.W.4 P.I. Mamledar that possession of drugs without valid licence was an offence rendering them liable for arrest. Both the accused were then arrested and again an offer was made to them to search the members of the raiding party including the panchas, but, the said offer was declined by both the accused. A panchanama of the events which had occurred were scribed and the same is at Exhibit P.W.3/A. The seizure report is at Exhibit P.W.3/B. On return to the police station an offence was registered on the basis of the complaint Exhibit P.W.4/A lodged by P.W.4 P.I. Mamledar. The intimation under Section 57 of the N.D.P.S. Act is at Exhibit P.W.4/C. The daily situation report is at Exhibit P.W.4/D. The arrest cards are at Exhibit P.W.4/E and the express report is at Exhibit P.W.4/F. P.W.4 P.I. Mamledar entered the muddemal in the muddemal register and handed over the property to P.S.I. Uday Naik.

5. P.W.4 P.I. Mamledar then sent the samples to the Chemical Analyser by letter at Exhibit P.W.1/B alongwith the specimen seal. P.W.2 Manohar Joshi received the samples for analysis on 22nd June 1998. On the same day he forwarded the samples for examination and received the report on 6th July 1998 alongwith the balance quantity. The examination report

was forwarded by him to P.I., Anti-Narcotic Cell, Panaji, by a letter at Exhibit P.W.2/B. P.W.1 Dr. Mahesh Kaisarre, who at the relevant time was working as a Junior Scientific Officer in the Directorate of Food and Drugs Administration, Panaji, examined the samples and by his report at Exhibit P.W.1/C found that the substance which he had analysed from the envelopes marked as 'Sample No. 1' and 'Sample No. 2' contained charas.

6. P.W.3 Sunil Meraji, a panch working in the Directorate of Transport, states that he had received instructions from his Office to act as a panch and, accordingly, on 19th June 1998 he alongwith another person by name Domingos had presented himself before P.W.4 P.I. Mamledar. He states about P.W.4 P.I. Mamledar informing him about the information received and conveyed to the Superior Officer. He also states about proceeding to the school for laying a trap. He states that accused no. 2 was holding a bag in his hand and it was a jute bag. From the tenor of his testimony it does not appear that two separate offers were given to both the accused, but, the offer of being searched in the presence of either a Gazetted Officer or a Magistrate, was a joint offer which was given to both the accused. This fact is further apparent in the cross-examination of this witness when he admits that:

"the said offer of search in presence of before a Gazetted officer or a Magistrate was given once jointly to both the acc.".

7. In support of its case the prosecution had also examined P.W.5 Satish Golcha, who was then the Superintendent of Police in-charge of C.I.D., Panaji. Both the accused in their statements under Section 313 Criminal Procedure Code claimed that they had been falsely implicated. The learned Special Judge, N.D.P.S. Court, on consideration of the entire prosecution evidence, convicted and sentenced both the accused as aforestated. Both the accused have, therefore, filed the aforesaid Appeals in this Court challenging their conviction and sentence.

8. Mr. D'Souza, the learned counsel appearing for both the appellants has urged before me that since the raid was conducted on prior information, compliance of Section 42 of the N.D.P.S. Act was mandatory and in the absence of compliance of the said Section, the entire conviction and sentence stands vitiated. In support of this proposition Mr. D'Souza has placed reliance on the Full Bench decision of this Court in the case of **Jayantilal Modi and another v. State of Maharashtra,** 1 All M.R. (Cri.) 601. It is next urged by Mr. D'Souza that there is total non-compliance of

Section 50 of the N.D.P.S. Act inasmuch as the offer of search, which was given to both the accused, was a joint offer and each of the accused was not individually given an offer. It is next urged that the search had been conducted before P.W.5 Satish Golcha, who, though being a Gazetted Officer, had accompanied the raiding party. It was also urged before me by Mr. D'Souza that P.W.5 Golcha was not the immediate superior of P.W.4 P.I. Mamledar and, therefore, there is a breach of the mandatory provision of Section 42 of the N.D.P.S. Act in communicating the information to the immediate superior. Lastly it was urged by Mr. D'Souza that the search of both the accused under Section 50 of the N.D.P.S. Act would also include the search of the bag on the person of the accused.

9. Mr. Lawande, the learned Public Prosecutor appearing for the State, has supported the Judgment of conviction passed by the learned Special Judge, N.D.P.S. Court. Answering the various points raised by Mr. D'Souza, it is submitted by Mr. Lawande that Section 42 of the N.D.P.S. Act has been complied with. According to the learned Public Prosecutor for the State, there was no sufficient time for P.W.4 P.I. Mamledar to record his grounds for not obtaining either a search warrant or an authorisation under the proviso to Section 42. In support of this proposition Mr.

Lawande has placed reliance on the Judgment of the Apex Court in the case of **Sajan Abraham v. State of Kerala,** (2001) 6 S.C.C. 692. It is also urged by the learned Public Prosecutor for the State that relying on the evidence of P.W.4 P.I. Mamledar, it is clear that the offer to search was not a joint offer but individual offers were given to each of the accused. It was also urged by the learned Public Prosecutor for the State that in the event of joint offers, the person from whose possession charas was seized would alone be entitled to be given the benefit and not the accused who was carrying narcotic drugs in the bag. Mr. Lawande also submitted that in view of the recent Judgment of the Apex Court, the search of bag is not covered under Section 50 of the N.D.P.S. Act. It is also urged before me that P.W.5 Golcha was the superior of P.W.4 P.I. Mamledar and there was no breach of Section 42 of the N.D.P.S. Act.

10. In respect of the first proposition Mr. D'Souza has placed reliance on the Full Bench decision of this Court in Jayantilal's case cited Supra. The reference to the Full Bench decision of this Court was necessitated on account of conflicting decisions of this Court in the case of **Longuram Tariram Thakur v. The State of Maharashtra,** 2000 All M.R. (Cri.) 542. This Court had taken a view that since in pursuance to

the prior information, the accused were found in possession of charas at the S.T. stand Pune, which was a public place, as contemplated under Section 43 of the N.D.P.S. Act, it was not necessary to comply with the provisions of Section 42 of the N.D.P.S. Act. In **Bindarsingh v. State of Maharashtra**, (1999) 1 M.L.J. 643, it was held by this Court that even if the information pertained to recovery of a narcotic substance under the N.D.P.S. Act was in relation to a public place, it was obligatory to comply with Section 42 of the N.D.P.S. Act. The Full Bench, thus, answered the reference as follows:-

> "In respect of an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 it is necessary for the empowered officer to comply with the provisions of section 42 even when the information received by him is regarding the commission of an offence in a public place of the like mentioned in the explanation to section 43."

11. There is, thus, considerable merit in the submission of Mr. D'Souza, the learned counsel for both the appellants, that there is no compliance of the proviso to Section 42 of the N.D.P.S. Act. In the present case the information was received by P.W.4 P.I. Mamledar on 19th June 1998 at 10.00 a.m.. He had already taken steps to secure the panch witness by 11.00 a.m.. The specific information which he had received was that both the accused would be coming in

front of the school between 7.00 p.m. to 10.00 p.m.. Thus, there was adequate opportunity and time available to P.W.4 P.I. Mamledar to comply with the proviso to Section 42 of the N.D.P.S. Act.

12. Mr. Lawande, the learned Public Prosecutor appearing for the State, has placed reliance on the decision of the Apex Court in **Sajan Abraham v. State of Kerala,** (supra). In **this case the information** was communicated to the Officer and he immediately proceeded to the scene of the offence and arrested the accused. Thus, he had no time at all to record the grounds of his belief. This decision of the Apex Court, therefore, is clearly distinguishable on facts and in my considered opinion would not apply to the facts in the present case. In the present case P.W.4 P.I. Mamledar had ample time and opportunity for complying with the proviso to Section 42 of the N.D.P.S. Act. Therefore, according to me, the non-compliance of Section 42, which is mandatory, must result in the acquittal of both the appellants. Since I am inclined to allow the Appeals on the point of non-compliance of Section 42 of the N.D.P.S. Act, it would be inappropriate for me to decide on the other questions which are raised by the learned counsel for the appellants. Therefore, the other points are not considered while deciding the present Appeals.

13. In the result, therefore, the Appeals are allowed. The conviction and sentence passed against both the appellants by the Special Judge, N.D.P.S. Court, Mapusa, in Special Criminal Case No. 19 of 1998 convicting both the appellants for offences punishable under Section 20(b)(ii) and Section 29 of the N.D.P.S. Act, 1985 and sentencing them to suffer rigorous imprisonment for ten years and fine of Rs. 1 lakh, in default to undergo simple imprisonment for one year is, hereby, quashed and set aside and both the appellants are acquitted of the offences for which they were charged. Both the appellants are set at liberty. Fine if paid, be refunded to both the appellants.

(P.V. HARDAS)
JUDGE.

ed's.